

OH KUANG LIANG

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v.

ASSOCIATED WOOD INDUSTRIES SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[ORIGINATING MOTION NO: 25-40-1994]
8 JUNE 1995

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EVIDENCE: Pre-trial "without prejudice" communication between solicitors - Whether privileged - Whether admissible in evidence.

PRACTICE & PROCEDURE: Affidavit - Application to strike out - Affidavit sought to disclose "without prejudice" letters written during negotiations to settle dispute - Whether scandalous, irrelevant or oppressive - Whether necessary to strike out whole affidavit - Order 41 r. 6 Rules of the High Court 1980.

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PRACTICE & PROCEDURE: "Without prejudice rule" - Whether based on public policy to encourage parties to settle disputes without resort to litigation - Proper approach to be adopted by Courts.

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WORDS AND PHRASES: "without prejudice".

The respondent's solicitors in this case, Messrs. Gan & Lim, had written a few letters to the applicant's solicitors, presumably in the course of negotiations to settle the disputes amicably between the parties. Except for one, all the letters bore the tag "without prejudice" on them. The applicant sought to put into evidence the communication made in the said letters, and hence affirmed an affidavit in which he inter alia deposed "I enclose herewith copies of the letters sent by my solicitors and the replies of Messrs. Gan & Lim marked as exhibit 'C'".

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The respondent applied to strike out the affidavit on the ground that the communication in question was privileged and therefore was not receivable in evidence. The issue that arose was whether in the circumstances herein such communication was in fact privileged and inadmissible, and if so whether the whole of the affidavit ought to be struck out.

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Held:

[1] The "without prejudice rule" is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them. The rule is applicable generally to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. The underlying purpose is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

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[2] Resting as it is on public policy, the correct approach to resolve such a rule is by balancing two different public interests, namely, the interest of promoting settlement on the one hand, and the interest of full discovery on the other. However, no question of discovery arises in the instant case as the parties were well aware of the negotiations and what transpired therein.

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[3] Although without prejudice material is admissible in evidence in certain cases, the exceptions do not whittle down the protection given to all parties to speak freely about all issues in the litigation, both factual and legal, when seeking a compromise to a dispute, and who, in the process, had admitted certain facts. It is clear that in such circumstance, if the compromise fails, the maker of the statement should not be held accountable and the admission

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a of the facts made therein ought not to be received in evidence. Such communication being privileged, the respondent's application, in the circumstances, must succeed.

[4] Though an affidavit may be ordered off the file if a scandalous or irrelevant material is inserted, it is not necessary for the Court to strike out the whole affidavit. As is explicit in O. 41 r.6 of the Rules of the High Court 1980, suffice if the Court strikes only those parts which are scandalous, irrelevant or otherwise oppressive.

b [Application allowed. Paragraph 7 of affidavit together with exhibit 'C' ordered to be struck out].

Cases referred to:

Osmaston v. Association of Land Financiers [1878] WN 101 (**refd**)

Rossage v. Rossage [1960] 1 WLR 249 (**refd**)

c *Warner v. Mosses* [1881] WN 69 (**refd**)

Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd [1990] 2 CLJ 777 (**dist**)

Tomlin v. Standard Telephones and Cables Ltd [1969] 3 ALL ER 201 (**dist**)

Cutts v. Head [1984] 1 ALL ER 597 (**fol**)

Walker v. Wilsher [1889] 23 QBD 335 (**refd**)

Re Daintrey, ex p Holt [1893] 2 QB 116 (**refd**)

d *Kitcat v. Sharp* [1882] 48 LT 64 (**refd**)

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 (**refd**)

Other sources referred to:

Halsbury's Laws of England, 4th. edn., para. 212

For the appellant - *Tan Hing Kuang; M/s Tam Cheng Yau, Tan & Co.*

For the respondent - *Gan Techiong; M/s Gan & Lim*

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JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

f This is an application by the respondent (enclosure 8) to strike out the affidavit of Oh Kuang Liang ("Oh"), the applicant in this originating motion, that was affirmed on 17 May 1995 (enclosure 6). The application of the respondent is supported by the affidavit of Tan Tu Kiah ("Tan"), the director of the respondent's company, affirmed on 25 May 1995 (enclosure 7). Tan deposed in his affidavit that the "without prejudice" letters between solicitors are inadmissible as they were said to be privileged. Tan took particular objections to two letters (dated 28 January 1994 and 6 April 1994) which he singled out and which clearly bore the "without prejudice" labels on them; he too took exceptions to the other three letters which equally bore the "without prejudice" tags on them. There was only one letter dated 26 February 1994 which did not carry the "without prejudice" label.

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Halsbury's Laws of England, fourth edition at paragraph 212, contains a brief summary of the law on communications "without prejudice". There, it is stated that:

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Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made "without prejudice", cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed.

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The privilege, where it exists, covers not only the particular letter itself but also all subsequent parts of the same correspondence on both sides, even if they are not expressed to be "without prejudice", unless there is a clear break in the chain of correspondence to show that the ensuing

letters are open. Moreover, it has been held to cover an open letter, followed by another from the same party to the effect that their communications were intended to be “without prejudice”.

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Again, at paragraph 213 of the same book under caption "Limits of the rule", it is stated that:

The contents of a communication made “without prejudice” are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are not otherwise admissible. Thus they cannot be used as admissions, or as acknowledgments to prevent a debt from becoming statute-barred, or, normally, for the purpose of deciding the question of costs, or to show malice, although it has been held that they may be admitted to prove matters not connected with the merits of the dispute.

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The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication.

Order 41, rule 6 of the Rules of the High Court, 1980 (“RHC”) reads as follows:

The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

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Osmaston v. Association of Land Financiers [1878] WN 101; *Rossage v. Rossage* [1960] 1 WLR 249, lay down an inflexible rule that an affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted. Even, at times, scandalous matter may be expunged (*Warner v. Mosses* [1881] WN 69). But it is not necessary for the Court to strike out the whole affidavit; sufficient it the Court strikes out only those parts which are scandalous, irrelevant or otherwise oppressive.

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From a perusal of Oh’s affidavit in enclosure 6, only paragraph 7 is said to be objectionable and that paragraph is worded thus:

Malahan sehingga affidavit responden diserahkan kepada peguam saya pada 5 April 1995 saya langsung tidak tahu akan tarikh perjanjian jual beli di antara responden dan pemaju dan walaupun saya telah beberapa kali melalui peguam saya menulis kepada peguam responden untuk meminta sesalanan perjanjian tersebut mereka telah enggan membuat demikian. Saya lampirkan bersama ini salinan-salinan surat-surat peguam saya serta jawapan-jawapan dari Tetuan Gan & Lim di tanda sebagai exhibit “C”.

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Exhibit “C” refers to the letters between the solicitors adverted to in the early part of this judgment.

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Abu Mansor bin Ali J (as he then was, now JCA) in *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd* [1990] 2 CLJ 777 at page 779 applied *Tomlin v. Standard Telephones and Cables Ltd* [1969] 3 ALL ER 201, and ruled that the “without prejudice” letters between Counsels were admissible because it was not possible to determine the issue without looking at the correspondence to see whether there was a binding agreement. His Lordship then proceeded to examine the affidavits of the parties together with the “without prejudice” letters.

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Tomlin (supra) was a decision of the English Court of Appeal. There, the three Judges wrote separate judgments. Sir Gordon Willmer agreed with the decision of Danckwerts LJ, while Ormrod J, wrote a dissenting judgment.

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a In strong words Danckwerts LJ, in *Tomlin (supra)* said:

A point that arises is that all the letters written by the agent of the insurance company bore the words "Without Prejudice". The point is taken that, by reason of those words, there could not be any binding agreement between the parties and it was said, indeed, on behalf of the defendants that the letters were not admissible. I feel no doubt, as the learned Judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence, and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.

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In his dissenting judgment, Ormrod J in *Tomlin (supra)* said at page 203:

From these cases it seems to me that the principle which emerges is that the Court will protect, and ought to protect so far as it can, in the public interest, "without prejudice" negotiations because they are very helpful to the disposal of claims without the necessity for litigating in Court and, therefore, nothing should be done to make more difficult or more hazardous negotiations under the umbrella of "without prejudice". I am well aware, coming from the division which I do, that letters get headed "without prejudice" in the most absurd circumstances, but these letters, in my judgment, are not letters headed "without prejudice" unnecessarily or meaninglessly. They are plainly "without prejudice" letters and, therefore, the Court, in my judgment, should be very slow to lift the umbrella of "without prejudice" unless the case is absolutely plain.

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There is one distinguishing feature in *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd (supra)* which is also apparent in *Tomlin (supra)*. It is this. The question of privilege was not raised in these cases. The question of privilege is raised before me in bringing home the point that the letters with the "without prejudice" labels were inadmissible.

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Cutts v. Head [1984] 1 ALL ER 597 at 605-606; [1984] Ch. 290 at 306, lays down a sound principle of law which merits reproduction. It is as follows:

That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J, in *Scott Paper Co. v. Drayton Paper Works Ltd* [1927] 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.

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It appears therefore that the "without prejudice rule" is a rule governing the conduct of the trial in particular controlling the admissibility of evidence and is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them in a Court of law. Court battles are to be avoided if the parties could settle their differences amicably.

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I am of the considered view that the "without prejudice rule" applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words "without prejudice" - to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the "without

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prejudice rule” would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigation, on the other.

I have done some research and I have discovered that nearly all the cases where the scope of the “without prejudice rule” has been considered concern the admissibility of evidence at trial after negotiations have failed. It is quite obvious that in these situations no question of discovery arises because the parties are well aware of what had transpired between them in the negotiations. It is not incorrect to say that the underlying purpose of the “without prejudice rule” is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Lindley LJ, held in *Walker v. Wilsher* [1889] 23 QBD 335 at 337, that the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement and this point seems to have been applied in *Tomlin (supra)*. I must at once sound a warning that *Walker v. Wilsher (supra)* is not an authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege is thrown to the wind, having served its purpose. On a proper reading of *Walker v. Wilsher (supra)*, I would have thought that there it was held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any possible subsequent proceedings. *Cutts v. Head (supra)* propounds the principle that in certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given. In *Re Daintrey, ex p Holt* [1893] 2 QB 116; [1891-4] ALL ER Rep. 209, the Court refused to allow the “without prejudice rule” to exclude an act of bankruptcy and in *Kitcat v. Sharp* [1882] 48 LT 64, the Court too refused to be bound by the “without prejudice rule” when its purpose was to suppress a threat if an offer is not accepted. I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence. I am not prepared, to borrow the words of Ormrod J, in *Tomlin (supra)* to lift the umbrella of “without prejudice” for the applicant. Rain or shine, that umbrella should remain. I am fortified in my view by the passages appearing in the judgment of Chang Min Tat FJ, in *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 FC, to the effect that:

It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

With respect, had *Malayan Banking Bhd v. Foo See Moi (supra)*, been brought to the attention of the learned Judge in *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd (supra)*, the decision arrived at might be different.

For the foregoing reasons, in my discretion, I strike out the whole of paragraph 7 together with exhibit “C” of enclosure 6, with an agreed costs of RM200 to the respondent payable by the applicant.